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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 615

JAMES B. ROBINSON,
Petitioner

v.

WILLIAM B. FRANKE, Secretary of the Navy,
Respondent

and

STEPHEN H. PAYSON,
Petitioner

v.

WILLIAM B. FRANKE, Secretary of the Navy,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the District of Columbia Circuit entered in the above cases on October 28, 1960, and August 4, 1960, respectively, (an extension of time of sixty days within which to petition for certiorari having been granted on October 28, 1960 until January 2, 1961 in the latter case by the Chief Justice).

OPINIONS BELOW

Opinions were not rendered by the United States District Court for the District of Columbia (Dist. Ct. Record, Robinson, CCA Record, Payson, 108) in either case. The United States Court of Appeals for the District of Columbia Circuit affirmed in *Robinson v. Franke* on October 28, 1960, on Government's motion without rendering an opinion (CCA Record, Robinson, 8). The opinion of the United States Court of Appeals for the District of Columbia Circuit in *Payson* v. *Franke*, announced on August 4, 1960, is reported at 282 F.2d 851, and a copy is appended to this petition as Appendix A.

JURISDICTION

The judgments of the Court of Appeals for the District of Columbia Circuit were made and entered on October 28, 1960 in *Robinson* v. *Franke*, and on August 4, 1960 in *Payson* v. *Franke*, and are appended to this petition in Appendices B [1] and C, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Both petitioners, officers of the regular Navy with over 17 years of active duty, were discharged as unsatisfactory pursuant to a Board's findings based *exclusively* on petitioners' fitness reports. The majority of the fitness reports were not shown to petitioners, and all of them were expressly graded satisfactory or better. Neither petitioner was granted a hearing or opportunity for a hearing, although the Board involved was authorized to conduct hearings prescribed by 10 U.S.C. 5863.

Moreover, despite the fact that the Board's consideration of officers for discharge as unsatisfactory was limited

[1] Appendix B also contains the Government's Motion to Affirm or Dismiss, Petitioners' Opposition and the Government's Reply.

to officers "with less than 20 years of service," both petitioners were, under 10 U.S.C. 6388, deemed to have constructively the same years of service as certain Naval Academy graduates once junior to them who had completed over twenty years' service.

The Government took the position in both cases that it was beyond the scope of the Court's power to review the Board's findings. In *Payson* v. *Franke*, the Court of Appeals sustained the Government's position in this respect, holding that it was without power to review the Board's findings. *Robinson* v. *Franke* was thereafter decided by the District Court and affirmed on Government's motion by the Court of Appeals (Circuit Judge Fahy would have denied the motion) on the basis of the opinion in *Payson* v. *Franke*. The questions presented are:

(1) Is the action of the Board involved judicially reviewable for arbitrariness or abuse of discretion?

(2) If the action is so reviewable, can sufficient basis for the Board's action be found in petitioners' records.

(3) Is the pertinent statute (10 U.S.C. 6384(a)) reasonably clear as to the Board's limits of authority to find an officer unsatisfactory so as to sustain its validity?

(4) Was the Board's failure to give petitioners an opportunity for a hearing a denial of administrative due process?

(5) Were petitioners officers with over "20 years of service" and therefore statutorily exempt from discharge as unsatisfactory?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The constitutional provisions, statutes and regulations which are relevant to decision of this case, and the perti-

nent text of which is set forth in Appendix D hereto, are Section 8, Article I of the United States Constitution, the Act of April 18, 1946, 60 Stat. 92, Sections 202(a) and 202(d)(1) of the Officer Personnel Act of 1947, 61 Stat. 816, Sections 6384(a), 6388(a) and (b), 5862, and 5863 of Title 10, United States Code, and Article 1701 (8), U.S. Navy Regulations.

STATEMENT

Petitioners originally brought separate suits for declaratory judgments to set aside a Selection Board's findings of unsatisfactory service which resulted in their discharge from the service. Jurisdiction of the District Court for the District of Columbia was invoked under the Administrative Procedures Act of 1946, 5 U.S.C. 1009, and under D. C. Code (1951), Section 11-306. (Dist. Ct. Record, Robinson, 2nd Amended Complaint; CCA Record, Payson, 1)

The facts of *Robinson* v. *Franke* serve better to highlight the issues.[2]

Commander Robinson was initially appointed in the Naval Reserve of the United States Navy, January 19, 1940, in the grade of lieutenant (junior grade). In

[2] Insofar as applicability of the governing opinion in *Payson* v. *Franke*, Appendix A, is concerned, the cases of Commanders Robinson and Payson would appear legally identical. Both were regular commissioned officers in the Civil Engineer Corps, United States Navy. Both had formerly been Naval Reserve officers. Both had completed over 17 years of active duty at the time of their disposition and were deemed to have the constructive service of Naval Academy graduates with over 20 years' active duty. Neither had any unsatisfactory fitness reports and the Government admits in each case that it cannot sustain the Board's action on any records outside these reports. Neither were ever shown the majority of their fitness reports upon which the Board's action is allegedly based. Both were branded as unsatisfactory by the same Board at the same time. Neither was given any opportunity to be heard on the matter.

August, 1940, he was ordered to active duty at Pearl Harbor, but was subsequently transferred to Wake Island. On December 22, 1941, while engaged in the defense of that outpost, he was taken a prisoner-of-war of the Japanese and remained in such status until September 11, 1945, when freed to American jurisdiction. Upon returning, he was promoted in successive steps through the grades of lieutenant, lieutenant commander, and finally to commander, and in April, 1947, was released from active duty. He, however, made application to be appointed to the Regular Navy and, this application being accepted, on August 1, 1947, he was permanently appointed to the Regular Navy in the temporary grade of commander (Civil Engineer Corps) and returned to active duty. Subsequently his grade of commander was made permanent to rank from February 16, 1950. (Dist. Ct. Record, Robinson, 2nd Amended Complaint, Answer)

Commander Robinson became statutorily eligible to be considered for discharge as unsatisfactory in the fiscal year 1952 and was presumably so considered for discharge by a Board that year and each successive year (Dist. Ct. Record, Robinson, Answer). In fiscal 1958, however, a Board, which was a combined Selection Board and Examining Board (CCA Record, Payson, 87), concluded—without setting forth any basis—that Robinson's records indicated his unsatisfactory performance of duty in his present grade (Dist. Ct. Record, Robinson, Record of Proceedings of Selection Board and Naval Examining Board). This, despite the fact that Commander Robinson's records contained no unsatisfactory ratings whatsoever. After the action of the Board was approved by the President, Commander Robinson was notified thereof and orders were issued for his discharge which became effective July 1, 1958 (Dist. Ct. Record, Robinson, 2nd Amended Complaint, Answer). He was given no opportunity for a hearing pursuant to 10 U.S.C. 5863 (Appen-

dix D) or otherwise and, in fact, was unaware of the Board's action until it had been approved. At the time of his discharge he had 17½ years' active duty—2½ short of eligibility for voluntary retirement.

Under Section 6384(a), Title 10, U.S.C., the Board was required to make its finding of unsatisfactory performance of duty *on the basis of petitioners' records.* The Government and petitioners have agreed that if any evidence of unsatisfactory performance of duty exists, it cannot be found in any of petitioners' records outside of their fitness reports. (Dist. Ct. Record, Robinson, Answer, CCA Payson 77) Moreover, since the Board must find that an officer performed unsatisfactorily *in his present grade,* the scope of review can be narrowed to petitioners' fitness reports in the grade of commander—or in Robinson's case, those fitness reports issued after his release as a prisoner-of-war. This is, of course, not to intimate that adverse material may be found in the other records, but rather to narrow the scope of review.

Looking now at Robinson's fitness reports, the form used for such reports during September 5, 1946 through July 4, 1951, provided in space 12 as follows:

> Give in this space a clear, concise appraisal of the officer reported on and his performance of duty, including any worthy of special mention. Include recommendations as to promotion. Any statements of unsatisfactory performance, ability, character, or conduct must be referred to the officer for statement. Statements of a constructive nature which refer to minor imperfections or lack of qualifications do not constitute an unsatisfactory report. For example: "This officer was a little slow in getting started but is now making good progress" or "This officer is well qualified in his present duties but has had no experience at sea" would not be unsatisfactory in nature. Check one of these boxes—I consider this report to be ☐ SATISFACTORY ☐ UNFAVORABLE ☐ UNSATISFACTORY

For the above-mentioned period, Commander Robinson's fitness reports were all marked "Satisfactory". (Dist. Ct. Record, Robinson, Photostats of Fitness Reports, p. 36-56)

For the period of July 4, 1951 to February 28, 1954, a different fitness report form was utilized. In this form, Item 14 provided as follows:

> A report containing adverse matter must be referred to the officer reported on for statement pursuant to article 1701(8) USNR. His statement should be attached to this report. Statements of minor deficiencies either in character or performance of duties must be brought to the attention of the officer reported on either orally or in writing. HAS THIS BEEN DONE? ..... WHAT IMPROVEMENT, IF ANY, HAS BEEN NOTED? .....
> .....

During this period Commander Robinson received no unsatisfactory marks on his fitness reports and there is no indication in Item 14 that any of the reports contained adverse matter. (Dist. Ct. Record, Robinson, Photostats of Fitness Reports, p. 21-35)

Starting March 1, 1954 and continuing for the remainder of Commander Robinson's naval career, a still further form was used for fitness reports. In this form, performance of duties were rated. Item 16 provided for an "Unsatisfactory" mark on a comparative basis. Item 21 provides as follows:

> (a) As a general rule, officers should not be shown their fitness reports by the reporting seniors unless the report contains adverse matter. An adverse report must be referred for statement pursuant to Article 1701-(8) Navy Regulations. His statement should be attached to this report.
>
> (b) Has the officer reported on seen this report?
>
> Yes ☐ No ☐

In the foregoing reports not one contained an unsatisfactory or adverse mark and not one was checked "Yes" under Item 21. (Dist. Ct. Record, Robinson Photostats of Fitness Reports, p. 1-20).

In summation, none of Robinson's fitness reports contained unsatisfactory ratings or are any indicated as unfavorable by the rating officer. Of all the reports, *it is indicated that only one was even ever seen by him or referred to him for comment.* This is the report for June 6, 1950 to August 31, 1950, which was referred to Robinson for comment by the Bureau of Naval Personnel rather than by his commanding officer. (Dist. Ct. Record, Robinson, Photostats of Fitness Reports, p. 41, 37-39) The purpose of referring the report to Robinson was in view of a comment contained in the report which reads in full as follows:

> *This officer has performed his duties satisfactorily since reporting as Assistant Naval Attache, Cairo, Egypt.* He should concentrate upon development of a more forceful personal presentation and positiveness. He is not recommended for promotion at this time. [Emphasis supplied]

This report, which unquestionably is petitioner Robinson's worst report and was rendered almost eight years prior to his discharge as unsatisfactory, is on its face not an unsatisfactory report. To the contrary, it affirmatively states that Robinson had performed his duties satisfactorily. One might easily conclude from Robinson's records that the Board had inadvertently confused his records with those of another less desirable officer.

Counsel for petitioners challenges the Solicitor General to point out anything in the pertinent records of Robinson which would provide any basis whatsoever for the Board's findings.

The same act[3] which first authorized the discharge

[3] The Officer Personnel Act of 1947.

of staff corps officers "with less than 20 years of service" as unsatisfactory, constructively gave to Regulars who had formerly been in the Reserves the same service "in respect to separation" of "an officer originally appointed in the grade or rank of lieutenant (junior grade) or ensign in the Regular Navy." There is no dispute that Commander Payson had constructively the same service as one Mark Henry Jordan (CCA Record, Payson, 77, 100) (who was appointed to the Regular Navy from the Naval Academy June 3, 1937, and served continuously thereafter without loss of precedent to have completed over 21 years' active duty upon Payson's disposition) or that Commander Robinson had constructively the same service as one John Joseph Cassidy who, by the same token, had completed 20 years' active duty at the time of Commander Robinson's discharge. (Dist. Ct. Record, 2nd Amended Complaint, Answer). Nevertheless, both Commanders Robinson and Payson were considered as officers "with less than 20 years of service" in respect to establishing eligibility for their separation as unsatisfactory.

Not only have petitioners lost a valuable retirement equity, but as a result of the arbitrary action of the Board, they will bear for the rest of their lives a brand of: "What did they do?" Yet, when put to it, the Government was unable to answer this simple question in the hearing before District Judge Youngdahl (Dist. Court Record, Robinson, Transcript)

REASONS FOR GRANTING THE WRIT

1. The decisions of the court below have either decided an important question of federal law which has not been settled by this Court or have decided the question in conflict with applicable decisions of this Court. The Court of Appeals has thus in effect held that it will not review the record to determine whether action taken to discharge a regularly commissioned officer of the armed

forces as unsatisfactory met the statutory criteria under which the action was ostensibly authorized even though it may be arbitrary and an abuse of discretion. The Court of Appeals has thus carved in a critical and important area an extensive exception to judicial reviewability of administrative actions contrary to this Court's decisions in *School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94 (1902); *Bates & Guild* v. *Payne*, 194 U.S. 106; *Lloyd Sabaudo Societa* v. *Elting*, 287 U.S. 329; and *Dismuke* v. *United States*, 297 U.S. 167; and more recently in *Peters* v. *Hobby*, 349 U.S. 331 (1955); and *Service* v. *Dulles*, 354 U.S. 363 (1957).

2. The subsidiary question of statutory construction pertaining to petitioners' years of service is, in itself, not unimportant. Thus, the decision of the Court of Appeals permits an uncontemplated discriminatory treatment as between line officers and staff corps officers and as between Naval Academy graduates and ex-Reserve officers that is clearly inconsistent with both the intent and letter of the law.

3. The Court of Appeals seems to have completely overlooked the applicability of the Administrative Procedures Act of 1946, 5 U.S.C. 1009, 60 Stat. 243. Section 10 of this Act provides: "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion— . . . (c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review." And the term "agency" includes the President, cabinet members, and other executive officers. It includes also the military except "courts martial and military commissions" and "military or naval authority exercised in the field in time of war or in occupied territory."[4] In the House report to this Act it is provided: "To preclude judicial review

[4] 5 U.S.C. 1001(a).

under this bill a statute if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it."[5] Having in petitioners' case a situation where, in contrast to the Army and Air Force, no hearing is given, no basis for the action is given, and no provision is made for adequate check on abuse of discretion, it is indeed remarkable that there may be no judicial inquiry as to whether the action may not constitute abuse of discretion. There is nothing in 10 U.S.Code 6384(a) which either specifically provides or gives "clear and convincing evidence of intent to withhold" judicial review. It would thus appear manifest the action of the Selection Board involved clearly falls within the ambit of judicial review provided by Section 10 of the Administrative Procedures Act of 1946.

4. Under the Constitution, while the President is the commander-in-chief of the Army and Navy, the power is given to Congress to provide and maintain a Navy and to make rules for the government and regulation of the land and naval forces.[6] The instances in history wherein the armed forces have been the instrument of power and control over a people are too numerous to recount. While this has fortunately been comparatively non-existent in this nation, especially in peacetime, never before have we maintained such a large peacetime Regular Establishment in the Armed Forces. It is perhaps more truly analogous of the armed forces than any other agencies that we have a large beast on a bridle. If this bridle should fray or become loose, should the judiciary be either more or less prone to repair the same than it is in the cases of those smaller beasties also bridled? It is petitioners' position that, if anything, more attention should be paid to this particular bridle than the others. In any event, certainly,

[5] Cf. *Heikkila* v. *Barber*, 345 U.S. 229, 232.

[6] Sec. 8, Art. I, U.S. Constitution (Appendix D); *Cf.* Federalist Papers Nos. 13 and 69.

no good reason is perceived why the armed forces, or specifically, why the Navy should be above the law than any other federal agency. Yet the opinion of the Court of Appeals creates just such a distinction. For while in *Crenshaw* v. *The United States* (1890), 134 U.S. 99, it was noted on page 107 that in "respect of official tenure there is no difference in law between officers in the army and other officers of the government," the Court of Appeals holds petitioners' cases nonreviewable by the Judiciary contrary to the holdings of this Court in connection with civilian officers, *Peters* v. *Hobby*, 349 U.S. 331 (1955), *Service* v. *Dulles*, 354 U.S. 363 (1957).

5. The citations by the Court of Appeals of *Creary* v. *Weeks*, 259 U.S. 336 (1922), and *Orloff* v. *Willoughby*, 345 U.S. 83 (1953), for its proposition that petitioners' cases are unreviewable, are only casually related to petitioners' cases. *Creary* v. *Weeks* involved a post World War I Board concerned with reduction in numbers in officers. In that case, the relator was given full opportunity to be heard and this Court carefully held at 343-344 that the "boards which acted on his case did not exceed the powers conferred upon them." Moreover, the statute involved specifically provided that the administrative action should be final. Still further, in *Creary* v. *Weeks* the board's function was, in effect, to thin out the "herd"—but giving those tentatively chosen for elimination opportunity to be heard. In comparison, the purpose of petitioners' board was to eliminate the "black sheep"—based upon the "sheepherders'" records. But the records of petitioners do not designate them as "black sheep". *Orloff* v. *Willoughby* held that this Court would not interfere with the President's power to *appoint* commissioned officers. The Court in no way indicated that this non-interference should apply also to an involuntary cutting off of tenure. In fact, the contrary was indicated (although in a back-handed manner) when the Court stated on page 90, "Whatever control courts have exerted over tenure or compensation under an appointment, they

have never assumed any process to control the appointing power either in civilian or military positions."

6. Although in *Payson* it was argued to the Court of Appeals that he should have been given a hearing under 10 U.S.C. 5862-5863, (Appendix D) the Court of Appeals failed entirely to comment on this issue. These provisions of law, and regulations in implementation thereof, give to a "candidate for promotion" notice and opportunity for a hearing before the board when the board entertains doubt as to his mental, moral and professional fitness. There is no question but that the Board considering petitioners had these powers, but did not exercise them in petitioners' cases. No explanation has been offered by the Government for this failure.[7]

7. The criteria set forth for the Board's action in 10 U.S.C. 6384(a) is whether the officer's record indicates that his performance of duty is unsatisfactory in his present grade and that he would not satisfactorily perform the duties of a higher grade. For a long time past, the Navy has specifically provided a place in an officer's fitness reports to mark him unsatisfactory if he was so considered by his reporting senior. Under Navy Regulations an officer is shown all unsatisfactory reports and given an opportunity to reply. (Navy Reg. Art. 1701(8), Appendix D) It is clear from the legislative history that it was specifically in view of this procedure that 10 U.S.C. 6384(a) was originally enacted into law. Yet the Gov-

[7] The Government has not contended that petitioners failed to exhaust their administrative remedies. But since in the oral arguments in *Payson*, despite the statutory provision for notice in 10 USC 5863(c), the Court expressed some curiosity as to whether Commander Payson had requested a hearing, it might be well to relate that Commander Payson did request review and cancellation of his prospective discharge but was informed that no person or board possessed the power to cancel or hold in abeyance his prospective discharge. Neither Payson nor Robinson knew that they had been selected for discharge as unsatisfactory until after the President's action.

ernment has contended that an unsatisfactory performance could be determined from purely ex parte reports which are all graded satisfactory such as petitioners—through insight gained by experienced naval officers beyond that of persons not so favored. And there is some hint from the opinion in *Payson* that the Court of Appeals felt it lacked such insight and *for such reason* could not review petitioners' records. But if this be so, it is submitted that the criteria of 10 U.S.C. 6384(a) is either no criteria or not the criteria intended by Congress, and the proviso itself must fail as being too broad of a delegation of legislative authority.

8. The opinion of the Court of Appeals in *Payson* restates petitioners' position upon the computation of years of service precisely opposite to that taken. It was and is petitioners' position that the original statute (Section 202 of the Officer Personnel Act of 1947, Appendix D) is unequivocally clear that Staff Corps officers were to count their service from the date of *original appointment* in the *Regular Navy* whether they were originally appointed in the Staff Corps or in the Line and transferred without loss of rank to the Staff Corps concerned. This way, all the service was counted and the transferee was, not, in effect, "reborn" when he was transferred. With such interpretation, Line and Staff Corps running mates became eligible for separation and retirement at the same time. However, despite the unambiguous nature of the statute, the Navy Judge Advocate General in 1949 opined that there was a statutory "rebirth" and Staff Corps transferees lost the time they had previously spent in the Line. (CCA Record, Payson, 111-123) Later, the Navy Judge Advocate General proposed a modification of his original opinion in line with that subsequently submitted on behalf of petitioners. But in the meanwhile a Codification of laws relating to the military was enacted. And whereas the prior provision was not ambiguous, the codified provision was. (10 U.S.C. 6388, Appendix D) In view of the Codification's changes, the

Comptroller General would not accept the Navy Judge Advocate General's proposal for a different interpretation on the grounds that the Codification had adopted his prior opinion (37 CompGen 747, CCA Record, Payson, 124-128). However, the Senate and House Reports to the Codification state that where such opinions were adopted with the text reworded to express those interpretations, such changes were explained in the revision notes. But, the changes in the applicable provision (10 U.S.C. 6388) were *not* so explained—there being no mention of the prior opinion of the Navy Judge Advocate General in the Revision notes at all.

Petitioners and their attorney alike seriously question whether consideration of the case by the Court of Appeals was more than superficial when the Court's statement, "Appellant seems totally to have overlooked the effect which must be given to Section 202(a) of the 1947 Act" is contrasted with the following from page 14 of the Reply Brief in *Payson*:

> Counsel for Appellant, however, utterly fails to discern any room for interpretation of the language in Section 202(d)(1), *supra*. When "commissioned officers holding permanent appointments in the Staff Corps" is substituted for "officers" in the section (See Appellee's Brief, page 12 [referring to Section 202 (a) of the 1947 Act]), the meaning would, if anything, seem even more clear that the clock for total commissioned service started running for these officers upon their original Regular Navy appointment. Moreover, it is submitted that this viewpoint is considerably fortified by the fact that the Judge Advocate General of the Navy indicated in his opinion submitted to the Comptroller General that he considered that the 1949 opinion did *not* correctly interpret Section 202(d). Had the Comptroller General agreed with the Judge Advocate General, it is apparent that we would not now be before this Court.
>
> It is a fundamental rule of statutory construction that where a statute is clear and unambiguous an administrative construction thereof is not material.

The foregoing is then followed in the Brief by one and one-half pages of pertinent case citations and quotations.

9. It might at first blush seem that the Court of Appeals' decision as to petitioners' years of service will have the same adverse effects on Line officer transferees to the Staff Corps as on ex-Reserve Staff Corps officers who later integrated into the Regular Navy. But this is not the case. While it is true that both remain together for eligibility to be recommended for discharge as unsatisfactory and for involuntary retirement, the Line transferee can count his "lost" time for voluntary retirement—something the ex-Reserve officer can not do. Hence, had either of the Line transferees, to which petitioners must look for their years of service under 10 U.S.C. 6388 (Appendix D), been recommended for discharge as unsatisfactory, they could have neatly avoided same merely by voluntarily retiring before their involuntary separation. Thus the Court of Appeals has succeeded in fostering a discrimination as to officers because of their source contrary to the express intent of Congress that no preference was to be accorded officers because they entered the Regular Navy from a particular source. (Act of April 18, 1946, Appendix D)

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this writ of certiorari should be granted.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15554

STEPHEN H. PAYSON, APPELLANT

v.

WILLIAM B. FRANKE, Secretary of the Navy, APPELLEE

Appeal from the United States District Court for the District of Columbia

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Decided August 4, 1960

Mr. Penrose Lucas Albright for appellant.

Mr. Daniel J. McTague, Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States Attorney, and *Carl W. Belcher*, Assistant United States Attorney, were on the brief, for appellee.

Before PHILLIPS, Senior United States Circuit Judge for the Tenth Circuit,* and WILBUR K. MILLER and DANAHER, *Circuit Judges.*

DANAHER, *Circuit Judge:* A Navy Department selection board was convened September 24, 1957, to consider the cases of officers of the Civil Engineer Corps of the Navy

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

on active duty eligible for consideration for temporary promotion to the grade of Captain. Three officers were selected. By direction of the Secretary, the selection board also considered the cases of all such officers "with less than twenty years of service" whose records indicated their unsatisfactory performance of duty in their present grade and that they would not satisfactorily perform the duties of a higher grade. The board found this appellant includable among the latter group. The report of the selection board was concurred in by the Chief of Naval Operations, and thereafter was approved by the Secretary of the Navy and the Secretary of Defense.

Finally, after the report had been approved by the President on October 17, 1957, appellant was given notice of the action taken and was informed that he would be separated from the service as of June 30, 1958. After the Secretary of the Navy had refused appellant's request that his discharge be suspended, appellant filed suit in the District Court where a temporary restraining order was issued. A motion for a preliminary injunction was denied, and appellant was finally discharged on July 18, 1958. Cross motions for summary judgment having been filed, the Secretary's motion was granted. Appellant's motion was denied and his case was dismissed, and this appeal followed.

Appellant's complaint had asked the District Court to adjudge and declare null and void that portion of the report of the selection board which reflected the board's opinion that appellant's record indicated his unsatisfactory performance of duty in his grade of Commander. Alternatively, appellant asked the District Court to adjudge and declare 10 U.S.C. § 6384 to be a nullity, (a), for its failure to prescribe with reasonable clarity the limits of the power entrusted to the selection board, or (b), for prescribing "unreasonable and too broad limits of authority which Congress is without power to prescribe."

The record shows that appellant on October 14, 1937 was appointed Lieutenant (j.g.) in the Civil Engineer Corps of the United States Naval Reserve and that he accepted appointment December 29, 1937. He was not called to active duty until January 22, 1941. He served in various grades until, on September 7, 1946, he was appointed an officer in the Regular Navy, Civil Engineer Corps, achieving the permanent rank of Commander in June, 1949. Pursuant to the Act approved April 18, 1946, 60 STAT. 92, 34 U.S.C. § 15 (1952), many officers like appellant who had served in World War II as Reserves transferred to the Regular Navy. It is clear from the Act that Congress contemplated no discrimination against officers because of the source from which they entered the Regular Navy and that no preference was to be accorded officers because they entered the Regular Navy from a particular source. Problems arose, nevertheless, and Congress next passed the Officer Personnel Act of 1947, 61 STAT. 795, 851, 34 U.S.C. § 306d(c)(2) (1952), (now 10 U.S.C. § 6384(a) (1958)), where provision was made for certain action by a selection board as to officers "of less than twenty years' service."

Despite appellant's claims, we perceive no proper basis upon which to conclude that the sections here applied were a "nullity." Not only does Congress possess specific constitutional authority to legislate with respect to the Navy, U. S. CONST. art. I, § 8, but the President from the same source derives his authority as Commander-in-chief. He appointed the Secretary of the Navy by whose "precept" the selection board was convened. To the latter, expressly detailed duties were assigned by the Secretary. The carefully outlined agenda, set forth in the record, discloses a comprehensive plan whereby a recorder was named and sworn, each member of the board was sworn to the performance of the specific duties devolving upon

the board, at least two-thirds of the membership were bound to, and did, concur in the ultimate individual opinions and conclusions, and the final findings were read aloud in the presence of all members who then signed the report as did the recorder. We can not agree that the administrative plan authorized by statute with the report of the board proceeding through channels, and ultimately approved by the President, was a "nullity."

Apparently the records of some 125 Civil Engineer Corps officers of the Navy were under consideration by the board. Three officers were found eligible for promotion and three others were in the board's sworn, collective judgment not qualified for continued service. Short of court martial proceedings based upon gross dereliction, or retirement for physical or mental disability, the mechanism may well seem to reflect the experience of long years involving thousands of officers, whose qualifications for continued service may thus become subject to periodic review. Congress has long been aware of the problem, with severance pay, retirement status and other personnel factors the subject of extensive legislation.

To decide, as we do, that the statutes and the proceedings under them are not a "nullity" is not to end our task. If appellant had achieved "total commissioned service" of twenty years, he would not have been subject to separation from service. He insists he possessed a record of twenty years' service for the purposes of 10 U.S.C. §§ 6384(a) (providing for action by the selection board looking to separation from the service), and 6388(a) and (b)(1) and (b)(2) (providing for computation of total commissioned service). He argues that the codifiers in drafting 10 U.S.C. and particularly § 6388(a) and (b)(1) and (b)(2), erroneously and substantively altered the source provisions to be found in the Officer Personnel Act of 1947, particularly Section 202(d)(1). The latter not only specified how "total commissioned service" must be

computed for Regular Navy Officers but related his service to one of the latter next junior to him.

Appellant thus claims that his "total commissioned service" should be deemed to date back to June 30, 1937, of the fiscal year from which his Naval Academy "running mate" must date his service under 10 U.S.C. § 6388 (a). On appellant's theory, his twenty years' service would have been concluded by June 30, 1957, and the selection board therefore lacked power to recommend his separation.

We do not agree. The record clearly shows that appellant's running mate had been appointed Ensign in the Regular Navy on June 3, 1937, but he did not accept appointment as Lieutenant (j.g.) in the Navy's Civil Engineer Corps until August 23, 1940. The onset date of his staff corps service, under the Act, became June 30, 1941.

Appellant seems totally to have overlooked the effect which must be given to section 202(a) of the 1947 Act. There the word "officers" was defined for the purposes of Title II to mean "commissioned officers . . . in the *Staff Corps* of the Regular Navy," (emphasis supplied) which included the Civil Engineer Corps. Thus section 202(d)(1) in referring to "total commissioned service" of such a Regular Navy Officer provided that computation must date "from June 30 of the fiscal year in which he accepted *such appointment*," *i.e.*, as a commissioned officer in the *Staff Corps*. Sections 202(a) and 202(d)(1) must be read together. The codifiers in drafting 10 U.S.C. § 6388 simply elided the terminology as to "staff corps" service to avoid the circumlocution and interpolation essential to a proper reading of the 1947 Act.

The affidavits and administrative records before us demonstrate a consistent application by the Navy of interpretations with which we agree. The Officer Personnel Act of 1947, 61 STAT. 815, denominates Title II as con-

taining "Permanent Provisions Relating to Officers of the Staff Corps of the Navy." The Judge Advocate General of the Navy had clearly distinguished section 102(d) of the 1947 Act as applicable to line officers from section 202(d)(1) as applicable to staff corps officers. That his persuasive opinion, Court-Martial Order 2-1949, p. 40, since followed, had commended itself to Congress, we do not doubt. The Comptroller General agrees. See 37 COMP. GEN. 747 (1958).[1] When Title 10 of the United States Code was enacted into positive law as of August 10, 1956, Senate Report No. 2484, 84th Cong., 2d Sess. 19 (1956), to accompany H.R. 7049, explained in pertinent part:

> "The object of the new titles has been to *restate existing law, not to make new law*. . . . Where court decisions, opinions of officials such as the Attorney General or the Comptroller General, executive orders, regulations, or well-established administrative practice have established authoritative interpretations clarifying ambiguities in the law, the text has been reworded to express those interpretations." (Emphasis added.)

We are satisfied that the original statute, the departmental interpretations, the codification and the Comptroller General's decision, *supra*, demonstrate that appellant's total commissioned service was correctly computed. Calculated as it was, appellant had not achieved the twenty years' service which would have insulated him from separation from service.

It is not our function to reassess the appellant's performance record which the selection board deemed unsatisfactory. Various references therein may well have ap-

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[1] Appellant on brief concedes that if these two administrative opinions can be sustained, his allegation that he had over 20 years' service, computed under 10 U.S.C. 6388, "must fail."

peared to an expert body to suggest an adequate basis for the conclusion which was reached. This may seem especially the case where this appellant's record was to be contrasted with many others. The criteria were for the board in its sworn judgment to apply for the good of the service. Suffice it to say that we are in no position to assess and appraise that record by itself even were we free to do so. Cf. *Orloff* v. *Willoughby*, 345 U.S. 83, 93 (1953); *Creary* v. *Weeks*, 259 U.S. 336, 343, *affirming Weeks* v. *United States*, 51 App.D.C. 195, 277 Fed. 594 (1922).

We have carefully considered every aspect of the claims advanced before us. We can not say that appellant's separation from service was improperly accomplished.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

(United States Court of Appeals For the District of Columbia Circuit Filed Oct 28 1960 /s/ Joseph W. Stewart Clerk)

No. 16,021 September Term, 1960

JAMES B. ROBINSON, APPELLANT

v.

WILLIAM B. FRANKE, Secretary of the Navy, APPELLEE

Before: Prettyman, Bazelon and Fahy, Circuit Judges, in Chambers

ORDER

On consideration of appellee's motion to affirm or dismiss, of appellant's opposition, and of appellee's reply, it is

ORDERED by the court that the judgment of the District Court is affirmed on authority of Payson v. Franke, No. 15,554, D.C. Cir., Aug. 4, 1960.

Per Curiam.

Dated: October 28 1960

Circuit Judge Fahy would deny the motion.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,021

JAMES B. ROBINSON, APPELLANT

v.

WILLIAM B. FRANKE, Secretary of the Navy, APPELLEE

MOTION TO AFFIRM OR DISMISS

Appellant was an Officer in the United States Navy. A Navy Selection Board compared appellant's service record with the service records of other officers of the Navy. It found that appellant's Navy service record indicated unsatisfactory performance of duty in his present grade and that he would not satisfactorily perform the duties of a higher grade. It recommended he be separated from the Navy. The Chief of Naval Operations, Secretary of the Navy, Secretary of Defense and the President approved this recommendation. Appellant was thus honorably discharged from the Navy. 10 U.S.C. § 6384.

In the District Court he challenged the jurisdiction and findings of the Selection Board. Because the same "precise questions" were involved, the District Court withheld its ruling pending this Court's decision in *Payson* v. *Franke*, Secretary of the Navy, appeal no. 15,554, decided August 4, 1960. Thereafter, appellee's motion for summary judgment was granted and appellant's cross motion for summary judgment was denied.

On appeal appellant argues the evidence before the Selection Board was insufficient to support the findings made by the Board. He does not argue a total absence

of any evidence to support those findings. In addition, he argues the Selection Board had no jurisdiction to review his service record because he was not "an officer with less than 20 years of service," a condition required by 10 U.S.C. § 6384(a). He relies upon his own interpretation of the definition section of the statute, 10 U.S.C. § 6388(a) and (b)(1) and (b)(2).

These same issues were rejected by this Court in an appeal brought by the same counsel who brings the instant appeal. *Payson* v. *Franke*, Secretary of the Navy, *supra*. As to appellant's first point, this Court held in *Payson*, it would not review the sufficiency of the evidence in a service record to support a similar finding by this same Selection Board. As to appellant's remaining point, this Court in *Payson*, validated the same application of the same statutes as is now challenged by the instant appellant.

Because of the recent decision by this Court in the *Payson* case, it is clear there is no merit to either of the issues raised by the instant appellant. Such appeals are to be summarily affirmed, *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923), or in the alternative, dismissed. F.R. Civil P. 75(a); 28 U.S.C. § 2106.

Wherefore, it is respectfully submitted the appeal be summarily affirmed or, in the alternative, dismissed.

/s/ OLIVER GASCH
OLIVER GASCH,
United States Attorney.

/s/ CARL W. BELCHER
CARL W. BELCHER,
Assistant United States Attorney.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been personally served on attorney for appellant, Penrose Lucas Albright, Esquire, 1111 E Street, N. W., Washington, D. C., this 11th day of October, 1960.

/s/ CARL W. BELCHER
CARL W. BELCHER,
Assistant United States Attorney.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,021

JAMES B. ROBINSON, APPELLANT

v.

WILLIAM B. FRANKE, Secretary of the Navy,
APPELLEE

OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

Appellant was a regular officer of the United States Navy. A Navy Selection Board found pursuant to Section 6384(a), Title 10, United States Code, that appellant's Navy records indicated his unsatisfactory performance of duty in his present grade and that he would not satisfactorily perform the duties of a higher grade. The President approved this recommendation and appellant was separated from the Navy. Appellant had no unsatisfactory fitness reports in his record—all such reports being graded satisfactory or better—and appellee has ad-

mitted that said fitness reports were the only material before the board which contained material on which the board's report could have been based. (See Allegation 6, Plaintiff's Second Amend. Complaint and Defendant's Answer)

Before the District Court, appellant asked that the finding of the selection board as pertains to him be declared a nullity and void on the grounds, *inter alia*, that the evidence before the selection board was legally insufficient to support the findings made by the board, and such findings were therefore arbitrary and capricious; and also that appellant was not "an officer with less than 20 years of service", as required for consideration under Section 6384(a), Title 10, United States Code. Appellant's Motion for Summary Judgment was denied and Appellee's Motion for Summary Judgment was granted by the District Judge on authority of the decision in *Payson* v. *Franke*, Court of Appeals No. 15554; decided August 4, 1960.

The case of *Payson* v. *Franke*, *supra*, involved an officer found unsatisfactory by the same selection board in the same report despite the fact that he did not have any unsatisfactory fitness reports. The contentions advanced in the *Payson* case were substantially the same as advanced in the instant case. This Court held in the *Payson* that it could not review the sufficiency of evidence in a service record to support the board's finding, and sustained the Government's interpretation of the statutes under which appellant's service is to be computed.

Counsel for Appellant agrees that the above holding in the *Payson* case appears to govern the instant case. It is the decision itself which is considered erroneous and, in opinion of counsel, warrants reversal.

It is thus appellant's position that there must be a rational basis in the evidence for the conclusion of the

selection board, and if such conclusion is not supported by evidence, the District Court could and should have set it aside together with orders based thereon as arbitrary. And it is appellant's further position that his "years of service" should be considered the same as the years of service of one John Joseph Cassidy, Jr. who was originally appointed to the rank of Ensign in the Regular Navy on June 2, 1938, and he therefore was not "an officer with less than 20 years of service" within the meaning of 10 U.S.C. 6384(a) upon disposition of the Selection Board's action.

While in no way considered controlling upon the legal aspects of this case, counsel invites to the Court's attention that he is authorized to seek review of the *Payson* case by the Supreme Court, and if this Court adheres to its holding in the *Payson* with respect to the instant case, it is contemplated that this case will be joined with *Payson* in such application to the Supreme Court.

Wherefore, it is respectfully submitted that, in view of the above and for reasons submitted in detail in the appellant Payson's briefs in *Payson*, this Court should not follow, but should reverse the precedent of *Payson* in this case, and accordingly the appeal should neither be summarily affirmed nor dismissed.

Respectfully submitted,

/s/ Penrose Lucas Albright
PENROSE LUCAS ALBRIGHT
Counsel for Appellant
708 Perpetual Building
Washington 4, D. C.

MASON, MASON & ALBRIGHT
Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition has been personally served on Carl W. Belcher, Esquire, Attorney for Appellee, at the U.S. Court House, Constitution Avenue and John Marshall Place, Washington, D.C., this 12th day of October, 1960.

/s/ Penrose Lucas Albright
PENROSE LUCAS ALBRIGHT
Counsel for Appellant

Copies to: Attorney General
Secretary of the Navy

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,021

JAMES B. ROBINSON, APPELLANT

v.

WILLIAM B. FRANKE, Secretary of the Navy, APPELLEE

REPLY TO "OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

Appellant concedes (Opposition, p. 2) that his Navy service record is in legal effect in the same posture as the Navy service record of Payson, the appellant in *Payson* v. *Franke*, appeal No. 15,554, decided August 4, 1960. In both service records there are no adverse conclusions stated in the various fitness reports in the service

records. However, in both service records there are certain fitness reports which do contain notations and comments which make it possible to reach an evaluation of the individual in comparison with other individuals by review of the service records and fitness reports of such other individuals. This comparison is the legal function of the Navy Selection Board.

This Court held in the *Payson* case that the Board could properly look behind the conclusions stated in fitness reports, looks to the notations and comments contained in the body of fitness reports, and reach a legal finding from comparing such notations and comments with similar material in the service records of other Navy officers. Thus, appellant presents no issue which is not now foreclosed to him by the decision in the *Payson* case.

Appellant suggests that *Payson* is wrongly decided. There is no petition for rehearing pending in *Payson*. That case is final, and, therefore, the law of this jurisdiction.

Wherefore, it is respectfully submitted this appeal be summarily affirmed, or in the alternative, dismissed.

/s/ OLIVER GASCH
OLIVER GASCH,
United States Attorney.

/s/ CARL W. BELCHER
CARL W. BELCHER,
Assistant United States Attorney.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply has been personally served on attorney for appellant, Penrose Lucas Albright, Esquire, 708 Perpetual Building, Washington 4, D. C., this 12th day of October, 1960.

/s/ CARL W. BELCHER
CARL W. BELCHER,
Assistant United States Attorney.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,554 September Term, 1959

Civil 1670-58

STEPHEN H. PAYSON, APPELLANT

v.

WILLIAM B. FRANKE, Secretary of the Navy, APPELLEE

Appeal from the United States District Court For the District of Columbia

Before: Phillips, Senior United States Circuit Judge for the Tenth Circuit, and Wilbur K. Miller and Danaher, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby, affirmed.

Dated: August 4, 1960

Per Curiam.

APPENDIX D

Section 8, Article I of Constitution:

Congress shall have the Power to . . . provide for the common Defense and general welfare of the United States; . . . To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval forces; . . . To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States, respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress; . . . And to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or Offices thereof.

The Act of April 18, 1946, 60 Stat. 92:

. . . [I]n order to remove any apprehension on the part of Naval Reserve officers regarding their opportunities for advancement in event of their transfer to the Regular Navy, it is hereby declared to be the policy of the Congress that in all matters relating to commissioned officers in the Regular Navy there shall be no discrimination whatsoever against officers because of the source from which they entered the Regular Navy, and that no preferences shall be given officers by reason of the fact that they entered the Regular Navy from any particular source.

Officer Personnel Act of 1947, 61 Stat. 816:

Sec. 202(a) As used in this title, the word "officers" shall be held to mean commissioned officers holding permanent appointments as such on the active list in the Staff Corps of the Regular Navy.

* * * *

(d)(1)

For the purposes of this title in respect to eligibility for continuation on the active list and in respect to separation from the active list, the total commissioned service of an officer originally appointed in the grade or rank of lieutenant (junior grade) or ensign in the Regular Navy, who has served continuously on the active list shall be computed from June 30 of the fiscal year in which he accepted such appointment, except for officers appointed pursuant to the Act of April 18, 1946 (Public Law 347, Seventy-ninth Congress). Each other officer shall be deemed to have for these purposes as much total commissioned service as any officer described above in this subsection who shall not have lost numbers or precedence and who is, or shall have been, junior to such other officer in his corps for the purpose of eligibility for promotion or selection for promotion since the date of the latter's first appointment to permanent commissioned rank in the Regular Navy above the grade of commissioned warrant officer, following which he shall have served continuously on the active list of the Regular Navy.

10 U.S. Code 6384(a):

Each selection board convened under chapter 543 of this title to recommend officers for promotion shall report, from among those officers eligible for consideration, the name of each officer with less than 20 years of service whose record, in the opinion of the board, indicates his unsatisfactory performance of duty in his present grade, and, in the opinion of the board, indicates that he would not satisfactorily perform the duties of a higher grade.

10 U.S. Code 6388:

(a) For the purpose of the preceding sections of this chapter, the total commissioned service of each officer originally appointed in the grade of lieutenant (junior grade) or ensign in any staff corps of the Navy, who has

since that appointment served continuously on the active list of the Navy, is computed from June 30 of the fiscal year in which he accepted that appointment. However, this subsection does not apply to officers appointed under the Act of April 18, 1946, ch. 141 (60 Stat. 92).

(b) Each other commissioned officer on the active list of the Navy in any staff corps is considered to have the same total commissioned service for the purpose of the preceding sections of this chapter as the officer in his corps described in subsection (a) having the maximum total commissioned service who—

(1) has not lost numbers or precedence; and

(2) is, or at any time has been, junior to the other officer for the purposes of eligibility for promotion and selection for promotion during that other officer's latest period of continuous service on the active list.

• • • •

10 U.S. Code 5862:

(a) Before an officer on the active list of the Navy or the Marine Corps may be permanently promoted to a higher grade, he must, except as provided in subsection (c), be examined by an examining board and certified, under section 5863 of this title, to be qualified.

(b) Before an officer on the active list of the Navy below the grade of rear admiral or an officer on the active list of the Marine Corps below the grade of major general may be temporarily promoted to a higher grade under section 5769, 5772, 5773, or 5784 of this title, he must be examined by an examining board and certified, under section 5863 of this title, to be qualified.

(c) An officer who has successfully passed the mental, moral, and professional examination for temporary promotion to a grade under subsection (b) may not again be examined for permanent appointment in that grade.

(d) Each board for the mental, moral, and professional examination of officers shall be convened by the President or, when authorized by the Secretary of the Navy, by the senior officer present, or other commanding officer, on a foreign station. A board convened by a senior officer present, or other commanding officer, on a foreign station may only examine officers who are under the command of the convening authority and who are directed to appear before the board.

(e) Each examining board convened under this section shall be composed of commissioned officers of the naval service. At least three members must act in each case. No member may act in the case of any officer senior to him.

10 U.S. Code 5863:

(a) Except as provided in subsection (b), an examining board convened under section 5862 of this title may take testimony and may examine all matter in the records of the executive part of the Department of the Navy relating to the case of any officer that it is considering. The president of a board shall administer the oath to all witnesses who testify in person before the board. A record shall be made of the examination and statement of the officer and of the testimony of the witnesses.

(b) The report of an examining board convened under section 5862 of this title, recommending an officer for promotion, is conclusive, after its approval, as to any fact concerning that officer that was considered and decided upon by the examining board. Such a fact may not again be considered by a later examining board unless it is a continuing one and shows the unfitness of the officer to perform his duties at sea. If a board fails to comply with this subsection, the President may direct a reexamination of the case of the officer concerned.

(c) An officer is entitled to be present and submit a statement under oath when an examining board convened under section 5862 of this title is considering his case. Before the board may find an officer not qualified, it must conduct a public examination of the records of the executive part of the Department of the Navy concerning the officer and, unless he fails to appear after due notice, of the officer himself.

(d) An examining board shall report the recommendation of an officer for promotion in the following terms: "We hereby certify that ..... has the mental, moral, and professional qualifications to perform efficiently all the duties, both at sea and on shore, of the grade to which he is to be promoted, and recommend him for promotion."

(e) The record and certification of a board in each case, with any record of the executive part of the Department of the Navy considered by the board to be necessary in the determination of that case, shall be submitted to the President for approval or disapproval of the finding.

U. S. Navy Regulations, 1948, Article 1701(8) provides:

(a) Adverse matter shall not be placed in an officer's record without his knowledge. It shall be first referred to the officer reported upon for such official statement as he may choose to make in reply. If the officer reported upon desires to make no statement, he shall so state officially in writing.

(b) When a report of fitness containing adverse matter, or any correspondence relating thereto, is sent to an officer, it shall be sent direct, addressed in his name. The officer concerned shall report any communication so received, together with his statement in reply to the Chief of Naval Personnel (Commandant of the Marine Corps) via the officer by whom the original report was completed and via the officer or officers through whom such report was forwarded.

FILE COPY

Office Supreme Court, U.S.
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JAMES R. BROWNING, Clerk

No. 615

In the Supreme Court of the United States

OCTOBER TERM, 1960

JAMES B. ROBINSON AND STEPHEN H. PAYSON,
PETITIONERS

v.

WILLIAM B. FRANKE, SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ARCHIBALD COX,
Solicitor General
GEO. S. LEONARD,
Acting Assistant Attorney General,
ALAN S. ROSENTHAL,
SHERMAN L. COHN,
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Department of Justice, Washington 25, D. C.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The District Court for the District of Columbia did not enter an opinion in either case. The opinion of the Court of Appeals for the District of Columbia Circuit in *Payson* v. *Franke* (Pet. App. 17–23) is reported at 282 F. 2d 851. The order of the court of appeals in *Robinson* v. *Franke* (Pet. App. 24) is not yet reported.

JURISDICTION

The judgment of the court of appeals in *Payson* was entered on August 4, 1960. The order of the court of appeals in *Robinson* was entered on October 28, 1960. On October 28, 1960, the Chief Justice

extended the time for filing the petition for a writ of certiorari in *Payson* to and including January 2, 1961. The petition for a writ of certiorari was filed on December 30, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners had twenty years of naval service within the meaning of 10 U.S.C. 6384.

2. Whether petitioners were entitled to a hearing before they could be honorably discharged from the service under 10 U.S.C. 6384.

3. Whether there is judicial review of a determination of a Navy Selection Board that a naval officer's performance is unsatisfactory and that he would not satisfactorily perform the duties of a higher grade.

4. Whether the Navy Selection Board's determination that petitioners' performances were unsatisfactory was arbitrary and capricious.

STATUTES INVOLVED

10 U.S.C. 6384 provides in pertinent part:

> (a) Each selection board convened under chapter 543 of this title to recommend officers for promotion shall report, from among those officers eligible for consideration, the name of each officer with less than 20 years of service whose record, in the opinion of the board, indicates his unsatisfactory performance of duty in his present grade, and, in the opinion of the board, indicates that he would not satisfactorily perform the duties of a higher grade.
>
> (b) Each officer on the active list of the Navy or the Marine Corps whose name is re-

ported under this section shall, subject to subsection (d), be honorably discharged from the naval service on June 30 of the fiscal year in which his name is so reported * * *.

(c) The years of service that are counted under subsection (b) are—

(1) for a male line officer of the Navy or a male officer of the Marine Corps, his years of total commissioned service as computed under section 6387 of this title;

(2) for a staff corps officer, other than a woman officer appointed under section 5590 of this title and other than an officer in the Nurse Corps, his years of total commissioned service as computed under section 6388 of this title;

* * * * *

10 U.S.C. 6388 provides in pertinent part:

(a) For the purpose of the preceding sections of this chapter, the total commissioned service of each officer originally appointed in the grade of lieutenant (junior grade) or ensign in any staff corps of the Navy, who has since that appointment served continuously on the active list of the Navy, is computed from June 30 of the fiscal year in which he accepted that appointment. However, this subsection does not apply to officers appointed under the Act of April 18, 1946, ch. 141 (60 Stat. 92).

(b) Each other commissioned officer of the active list of the Navy in any staff corps is considered to have the same total commissioned service for the purpose of the preceding sections of this chapter as the officer in his corps described in subsection (a) having the maximum total commissioned service who—

(1) has not lost numbers or precedence; and

(2) is, or at any time has been, junior to the other officer for the purposes of eligibility for promotion and selection for promotion during that other officer's latest period of continuous service on the active list.

* * * * * *

STATEMENT

Petitioners instituted separate actions in the district court for declaratory judgments that their honorable discharges from the United States Navy were null and void (J.A. 1–4; R. II–6).[1] The district court first entered judgment against petitioner Payson, which was affirmed by the court of appeals (J.A. 108, Pet. App. 17). The district court, on the authority of the court of appeals' decision in *Payson*, thereupon entered judgment against petitioner Robinson (R. II–140). This decision was also affirmed, on the authority of *Payson* (Pet. App. 24).

Petitioners' counsel agrees here (Pet. 4), as he did in the court below (Pet. App. 28–29), that the facts in the two cases are identical for all relevant purposes. For that reason, and for purposes of simplicity, we shall refer to the facts in *Payson* as illustrative of both cases.

The Statutory Scheme. 10 U.S.C. 5702 provides for the convening of selection boards by the Secretary of the Navy for the purpose of recommending for promotion staff officers of the Regular Navy. For this purpose, the boards are provided the names

[1] Page references to the joint appendix in the court of appeals will be preceded by "J.A." Other parts of the record will be referred to as "R."

of all officers eligible for promotion and their records. 10 U.S.C. 5706(4), (12). The boards must "report * * * the name of each officer with less than 20 years of service whose record, in the opinion of the board, indicates his unsatisfactory performance of duty in his present grade, and, in the opinion of the board, indicates that he would not satisfactorily perform the duties of a higher grade." 10 U.S.C. 6384(a). Each officer so reported, with certain exceptions here immaterial, is to be honorably discharged from the Navy. 10 U.S.C. 6384(b).

10 U.S.C. 6384(c) provides that "years of service" of a staff officer are to be computed, for the purpose of determining his eligibility to separation under this section, in accordance with 10 U.S.C. 6388. Subsection (a) of the latter section provides that "the total commissioned service of each officer originally appointed in the grade of lieutenant (junior grade) or ensign in any staff corps of the Navy, who has since that appointment served continuously on the active list of the Navy, is computed from June 30 of the fiscal year in which he accepted that appointment." But 10 U.S.C. 6388(a) "does not apply to officers appointed under the Act of April 18, 1946, ch. 141 (60 Stat. 92)." Such an officer comes under 10 U.S.C. 6388(b), which provides, so far as material, that he "is considered to have the same total commissioned service * * * as the officer in his corps described in subsection (a) having the maximum total commissioned service who * * * is, or at any time has been, junior to the other officer for the purposes of eligibility for promotion and selection for promotion * * *."

The Pertinent Facts. On December 29, 1937, Payson accepted an appointment as a lieutenant (j.g.) in the Civil Engineer Corps of the United States Naval Reserve, but was not called to active duty until January 22, 1941 (J.A. 75). He remained in the Reserve until September 7, 1946, when he was appointed an officer in the Civil Engineer Corps of the Regular Navy, pursuant to the Act of April 18, 1946, 60 Stat. 92 (*ibid.*). By June 1949 Payson had received the permanent grade of commander and by November 1952 he was eligible for promotion to captain (*ibid.*). Payson's "officer of reference," for the computation of his years of service under Section 6388, was Mark Henry Jordan (J.A. 77). Jordan was appointed a line ensign in the Regular Navy on June 3, 1937, but did not accept an appointment as lieutenant (j.g.) in the Civil Engineer Corps of the Regular Navy until August 23, 1940 (J.A. 76).

On September 24, 1957, a Navy Selection Board, composed of six high ranking naval officers, was convened to review the records of all officers of the Civil Engineer Corps of the Navy on active duty eligible for promotion to the grade of captain and "with less than twenty years of service" (J.A. 77, 83–84, 86). The Board had before it only Payson's fitness reports upon which to determine his fitness for continuation in the Navy (R. 77). These reports showed, among other things, that in at least three assignments the opinions of Payson's commanding officers concerning his work declined as they became more familiar with him and his performance. His fitness reports for the period of August 31, 1945, to

April 30, 1946, when Payson was at Okinawa, reflected just such a decline. In October 1945 he was rated by his commanding officer as being an officer whom he "particularly desired" to have under his command and whom he would promote if only 10% of his fellow commanders were to be promoted (J.A. 8). On the last fitness report, six months later, the commanding officer stated that he would promote Payson only if 70% of his fellow commanders were to be promoted and reported that he would be not "pleased" but "satisfied" to have Payson under his command. It was also noted that Payson's "sense of responsibility is not as well developed as it is in the average officer of his age" (J.A. 11).

During his tour at Camp Lejeune, North Carolina, from March 7, 1951, to January 9, 1953, Payson's ratings began at 4.0 ("outstanding") and ended at 3.5 ("average") (J.A. 24, 45). Two reports during this period, one of them the final report, contained a note that Payson was "not too strong physically" and was "not too well qualified for promotion" (J.A. 39, 45).

From Camp Lejeune, Payson went to the Joint United States Mission in Greece. On November 8, 1954, his commanding officer reported that Payson had (J.A. 57):

> had financial troubles, and this with little work to do has, evidently, caused him to drink unwisely. On a foreign station this cannot be overlooked or condoned. I consider Commander Payson to be psychologically unfitted for foreign shore duty.

On this fitness report, he was designated as "[a]n acceptable officer," which is a category between "[u]nsatisfactory" and "[a] dependable and typically effective officer" (J.A. 57).

Payson's last duty station was Puget Sound Naval Ship Yard. Here, too, his fitness reports showed a constant decline (J.A. 62, 64, 66, 69, 71, 73). The last three reports, covering the year prior to the Selection Board's action, all noted that "additional assignments under more senior officers" were needed "to develop his emotional maturity and reliability" before Payson "should become qualified for independent duty" (J.A. 69, 71, 73).

The Selection Board considered the records of some 125 officers of the Civil Engineer Corps and found three eligible for promotion to captain (J.A. 84, 92–96). The Board also found that three officers, including petitioners, were not qualified for continued service since their records "indicate their unsatisfactory performance of duty in their present grade, and * * * that they would not satisfactorily perform the duties of a higher grade" (J.A. 84–85). This report was concurred in by the Chief of Naval Operations and approved by the Secretary of the Navy, the Secretary of Defense, and finally the President (Pet. App. 18).

Payson sought a declaratory judgment that the Selection Board's action concerning him was a nullity because (1) the decision had no basis in his records and therefore was arbitrary and capricious; and (2) by the time the Selection Board convened, he had completed twenty years' commissioned service with-

in the meaning of 10 U.S.C. 6388 for the purposes of 10 U.S.C. 6384, and was therefore not subject to being removed by a selection board (J.A. 3). Payson argued that Section 6388(a) required the computation of Jordan's service from the end of the fiscal year in which Jordan was appointed an ensign in the Navy (June 30, 1937), and thus both Jordan and Payson had over twenty years' commissioned service by the time the Selection Board was convened on September 24, 1957.

The district court entered summary judgment for the Government (J.A. 108). The court of appeals affirmed, finding on the basis of the legislative history and consistent administrative application that Jordan's commissioned service as a staff officer was to be computed for purposes of 10 U.S.C. 6388(a) from "the onset date of his staff corps service" (Pet. App. 21)—*i.e.*, from the end of the fiscal year of his appointment in the Naval Civil Engineer Corps, June 30, 1941. The court went on (Pet. App. 22):

> We are satisfied that the original statute, the departmental interpretations, the codification and the Comptroller General's decision * * * demonstrate that appellant's total commissioned service was correctly computed. Calculated as it was, appellant had not achieved the twenty years' service which would have insulated him from separation from service.

The court further held it not to be its "function to reassess the appellant's performance record" (Pet. App. 22) and noted that his record (Pet. App. 22–23):

> may well have appeared to an expert body to suggest an adequate basis for the conclusion

which was reached. This may seem especially the case where this appellant's record was to be contrasted with many others. The criteria were for the board in its sworn judgment to apply for the good of the service. Suffice it to say that we are in no position to assess and appraise that record by itself even were we free to do so.

ARGUMENT

1. In terms, 10 U.S.C. 6388(a) requires that Jordan's time of service be measured from his acceptance of an appointment as a *staff* officer. It specifically provides that "the total commissioned service of each officer originally *appointed* in the grade of lieutenant (junior grade) or ensign *in any staff corps* of the Navy, who has since *that appointment* served continuously on the active list of the Navy, is computed from June 30 of the fiscal year in which he accepted *that appointment*" (emphasis added). The clear meaning of the statute, that "that appointment" refers to the appointment "in [the] staff corps", is fortified by the fact that an appointment as a line officer is separate from an appointment as a staff officer and that a transfer from line to staff or vice versa requires a new appointment. See 10 U.S.C. 5573(a)(1), 5582.[2]

Section 6388 was derived from Section 202 of the Act of August 7, 1947, 61 Stat. 816, 34 U.S.C. (1952 ed.) 3b. See reviser's notes following 10 U.S.C. 6388. 34 U.S.C. 3b(a) provided that for the purposes of

[2] 10 U.S.C. 5582(b) provides that "[a]ny male officer on the active list in the line of the Navy * * * *may be appointed* to the active list of the Navy in the Supply Corps or the Civil Engineer Corps * * *." (Emphasis added.)

Section 3b the term "officers" shall mean "commissioned officers holding permanent appointments as such on the active list in the Staff Corps of the Regular Navy." Section 3b(d)(1) provided that, in respect to separation from the active list, "the total commissioned service of an officer" (*i.e.*, an officer "holding [a] permanent appointment * * * in the Staff Corps") "shall be computed from June 30 of the fiscal year in which he accepted such appointment * * *." The Judge Advocate General of the Navy in two formal opinions stated that under Section 3b(d)(1) only the time spent as a commissioned *staff* officer was to be used for computation of "twenty years' service" of such officer. Navy Department, Court-Martial Order 1, 1949, p. 12; Navy Department, Court-Martial Order 2, 1949, p. 40.

This interpretation of Section 3b(d)(1) was consistently applied by the Navy from the time of the Judge Advocate General's decision until Congress reenacted the statute in 1956 as 10 U.S.C. 6388 (J.A. 106). The reenactment, rather than being a modification of existing law, was intended only to codify existing law as construed and interpreted by judicial and administrative sources. See S. Rept. 2484, 84th Cong., 2d Sess., p. 19. Thus, whatever differences in language there may be between the 1947 Act and the present 10 U.S.C. 6388, Congress intended only to embody in the statute itself the 1948 and 1949 interpretations of the Navy Judge Advocate General.[*] This

[*] Petitioners claim (Pet. 14–15) that 10 U.S.C. 6388 did not codify the Navy Judge Advocate General's opinions because, wherever administrative opinions were intended to be codified,

was the position taken by the Comptroller General in an opinion in 1958 which gave 10 U.S.C. 6388 a construction identical to that reached by the court below in the instant case (37 Comp. Gen. 747, 749):

> There appears to be no reasonable basis to conclude that in the rewording used in the codification of section 202(d)(1) of the 1947 act [34 U.S.C. (1952 ed.) 3b(d)(1)], the words "any staff corps of the Navy" were substituted for the words "the Regular Navy" for a purpose other than that of expressing and adopting the administrative interpretation of that section which apparently was being followed consistently by the Department of the Navy—the only Department having personnel subject to such section. The Congress has adopted that interpretation by enacting plain and specific language based on such interpretation and, in our view, that plain language must be given its plain meaning and application.[4]

2. Petitioners' contention (Pet. 13) that they were improperly denied an administrative hearing authorized by 10 U.S.C. 5862–5863 is without merit. These

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this was stated in the reviser's notes. If petitioners are correct, Congress intended merely to reenact in 10 U.S.C. 6388 the meaning of Section 3b. As we have shown above, 10 U.S.C. 6388 is specific that Jordan's time of service must be measured from his acceptance of appointment as a staff officer. Thus, Congress clearly construed Section 3b to have this same meaning whether this construction was based on Section 3b alone or on Section 3b as interpreted by the Navy Judge Advocate General.

[4] This opinion of the Comptroller General rejected a proposal by the Navy Judge Advocate General (made in 1958 subsequent to the Navy's action in petitioners' cases) to overrule its earlier 1948 and 1949 opinions. The Navy has adhered to the Comptroller General's decision.

sections expressly relate to the action of an "examining board" for the consideration of naval officers before they are "promoted permanently to the grade of lieutenant." Petitioners were commanders (J.A. 75) being considered by a selection board convened under an entirely different provision of the Code (10 U.S.C. 5702).

3. The court below correctly held, relying on *Creary* v. *Weeks*, 259 U.S. 336, that there is no judicial review of a Navy selection board's determinations. In that case, a military officer similarly attempted to obtain judicial review of a determination of military boards that he "should not be retained in the service" for "causes due to his neglect, misconduct, and avoidable habits." 259 U.S. at 342. After noting that the military had followed the procedural and substantive rules laid down by Congress, this Court held that, "[s]uch being the case, the Supreme Court of the District was without power to review or in any manner control the conduct of the boards or the result of their action. *Dynes* v. *Hoover*, 20 How. 65, 82; *Johnson* v. *Sayre*, 158 U.S. 109; *Carter* v. *McClaughry*, 183 U.S. 365, 380; *Mullan* v. *United States*, 212 U.S. 516; *Reaves* v. *Ainsworth*, 219 U.S. 296, 304." 259 U.S. at 344. Cf. *Orloff* v. *Willoughby*, 345 U.S. 83, 93–94.

Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009, has not changed this rule. For Section 10 specifically states that it has no application where agency action is by law committed to agency discretion and, as this Court has held, determination of military personnel matters "rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized com-

munity governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters." *Orloff* v. *Willoughby, supra,* 345 U.S. at 94. This is particularly true in the instant situation, since, as the court below noted (Pet. App. 22–23), the judiciary is not in a position to judge the factors that have weighed in the minds of a body expert in military matters that has reviewed the records of a large number of officers and found some to deserve promotion and others to warrant separation.

4. In any event, the record in this case precludes any suggestion that the action of the Naval Selection Board in finding petitioners unsatisfactory for further service was arbitrary or capricious. As we have shown (*supra,* pp. 6–8), after eight years as a commander and after five years of eligibility for promotion to captain, petitioner Payson's fitness reports still showed inability to exercise independent judgment and command responsibility. Petitioners' records clearly contain sufficient evidence upon which the expert board could find them unsuited for promotion or further service in their then present grade.[8]

[8] Petitioners also suggest (Pet. 3) that 10 U.S. 6384(a) is so vague as to be invalid. This contention is clearly without merit. A Navy selection board has the knowledge and background to determine whether a Naval officer's performance is satisfactory and whether he could satisfactorily perform the duties of a higher grade. Moreover, such a general standard was essential in order to give selection boards sufficient flexibility to meet whatever circumstances might arise.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Supreme Court of the United States

No. 615

REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 615

JAMES B. ROBINSON,

Petitioner

v.

WILLIAM B. FRANKE, Secretary of the Navy,

Respondent

and

STEPHEN H. PAYSON,

Petitioner

v.

WILLIAM B. FRANKE, Secretary of the Navy,

Respondent

REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

Upon review of the Brief for the Respondent in Opposition, certain statements are noted which may leave the reader with a misconception of the applicable law and of the existing situation in certain instances. In view thereof it is considered appropriate that a reply brief be submitted on behalf of petitioners.

Failure to Give Hearing

Attorney for petitioners is greatly perplexed by respondent's statements that sections 5862 and 5863 of Title 10, United States Code, 70A Stat. 369, (Pet. App.

36-38) under which petitioners argue that they were entitled to a hearing (Pet. 13), "expressly relate to the action of an 'examining board' for the consideration of naval officers before they are 'promoted permanently to the grade of lieutenant,'" and that petitioners were not given opportunity for the prescribed hearing because they were "considered by a selection board convened under an entirely different provision of the Code." (R.Br. 12-13)

One need only read sections 5862 and 5863, *supra*, to ascertain that they apply, insofar as candidates for *permanent* promotions are concerned, to *all* officers "on the active list of the Navy" and insofar as candidates for *temporary* promotion are concerned, to *all* officers "on the active list of the Navy below the grade of rear admiral." In either event, petitioners are covered and to set forth that the provisions involved relate only to the consideration of naval officers before they are promoted to the grade of *lieutenant* is an obvious misstatement.

Moreover, the Secretary of the Navy's precept for the Board in this case clearly established the Board as a combination "selection board" *and* "examining board" to perform the functions of each such board (CCA Record, Payson 87-90), and, in fact, the Board *did* constitute itself "a Naval Examining Board" (CCA Record, Payson 85). Subsequently, the record of proceedings of the Board were submitted to the President as one "of sixteen naval officer selection boards and *examining boards*." (Emphasis added, CCA Record, Payson 78).

The question thus still remains unanswered as to why the Board ignored the procedure prescribed in 10 USC 5863, 70A Stat. 369, which would have given petitioners opportunity for a hearing.

No Basis Shown for Board's Action

Although specifically challenged to point out *anything* in the pertinent records in *Robinson* which would provide

any basis whatsoever for the Board's finding, the Solicitor General has chosen completely to ignore the challenge. (Pet. 8). Apparently fearful of the harsh glare of injustice irradiating from *Robinson*, he instead chooses to chase shadows in *Payson*.

It is submitted that this Court will not so easily be deceived. No one seriously argues that the shadows in *Payson* form the *ratio decidendi* for the Court of Appeals' decision. Otherwise the Court of Appeals would have found substance, not merely suggestion,[1] for an adequate basis for the Board's conclusion in *Payson*. What then is the reason for the Solicitor's agility in avoiding the facts of *Robinson*? May it be suggested that he also entertains reservations as to the correctness of the Court of Appeals' decisions, or is it a tacit admission that the Board's action with references to *Robinson*, if judicially reviewable, is unsustainable?

Let us, however, briefly look at the shadows in *Payson* to which respondent refers. Significantly, he does not deny that all of Commander Payson's fitness reports were satisfactory or better. Rather he alleges that "in at least three assignments the opinions of Payson's commanding officers concerning his work declined as they became more familiar with him and his performance."

But this statement by respondent is misleading inasmuch as the so-called declines in the first two cited assignments incorporate jumps from the report of one commanding officer to that of another. It is of course obvious that the various commanding officers will not employ the exact 'same' criteria in grading. Some will be liberal while

[1] This is, of course, in reference to the Court of Appeals observation in the Payson opinion (C. A. App. p. 22-23) that: "Various references therein [Payson's record] may well have appeared to an expert body to *suggest* an adequate basis for the conclusion which was reached." (Emphasis supplied)

others will be strict and it is self-evident that the law of averages will bring about ups and downs in the records of all but the most outstanding, or conversely, the most unsatisfactory officers.

The important thing is that none of the commanding officers gave Commander Payson a "flunking" grade. The situation is in some ways not unlike failing a student on a basis of consistently passing marks. Certainly no one would contend, that because one professor gave a student an A in his first semester of a course and another professor gave a B to the same student in the second semester, the student was actually doing F work. But this is exactly what the Government is contending in reference to *Payson*. And the penalty suffered by petitioners was much more severe.

Respondent also makes much of certain remarks which he takes out of context from Commander Payson's records. For example in reference to the report made out by his Commanding Officer at the Joint United States Mission in Greece in 1954, which is unquestionably Commander Payson's worst report (CCA Record, Payson 57), respondent on page 7 of his brief neglects to quote the first and last portions of the comments which are as follows:

> [First portion] During the period of this report there have been no duties of this command requiring an officer of the Civil Engineer Corps. The evaluation has, of necessity, been based on general observation . . . . [Last portion] He would, I believe, be an excellent officer when assigned to duty in the United States commensurate with his rank and corps.
>
> He has a pleasing personality and is considered well qualified to deal with the public in both personal and official contacts.

The aforesaid report, made out some three years before the Board found Commander Payson's performance of duty to be unsatisfactory, is the *only* report which was ever referred to Commander Payson for official comment.

And, in spite of the fact that this is by far Commander Payson's worst report, the reporting officer, Rear Admiral Ralph Earle, Jr., found his performance of duty in all aspects to be satisfactory or above. In effect, Admiral Earle rapped Commander Payson's knuckles for indiscreet use of alcohol. Commander Payson stated that this would not occur again and there is nothing to show that it did. If it had reoccurred, there was ample authority under 10 USC 5862-5866 to have given him a hearing and if he was found morally disqualified to perform the duties of his grade, to have discharged him.

Irrespective of the foregoing, it would seem about time that someone in the Government gave some reason for the finding of unsatisfactory service made by the Board in *Robinson*. What did he do? The Government having utterly failed on this score, it is submitted that respondent's "In any event" argument (R.Br. 14) must also fail, and that it would not be inappropriate for this Court again to ask the question upon the grant of the petition herein.

Years of Service

Respondent seems correctly to assess that the basic issue in regard to the computation of petitioners' years of service lies in whether 10 USC 6388(a) will permit the interpretation urged by petitioners, and has quoted from same with certain emphasis on page 10 of his Brief to the opposite effect. But, with somewhat different emphasis, the section may be seen not to be quite so clear as respondent would have the Court believe.

Firstly, it will be noted that the companion section, 10 USC 6387, is crystal clear that all line officers look under subsection (a) thereof to the date of *original* appointment or to June 30th of the year of *original* appointment, or under subsection (b), constructively to the years of service prescribed for an officer under subsection (a). It will

be readily apparent that the fact that the original appointment may have been in a staff corps pursuant to 10 USC 5573 will result in no "rebirth" should the officer be transferred *from* the staff corps *to* the line under 10 USC 5582.

Is section 10 USC 6388(a) capable of a consistent construction? That is, will section 6388(a) permit a construction whereby there will be no "rebirth" when the transfer is *from* the line *to* the staff corps? Petitioners submit that it will. Thus, in this connection, it may be seen that 6388(a) provides a means for computing "the total commissioned service of each *officer* originally appointed in the grade of lieutenant (junior grade) or ensign *in any staff corps* of the Navy, who since that appointment served continuously on the active list of the Navy . . . ."

The basic problem is whether the italicized portion *in any staff corps* can be construed to have reference to the preceding word *officer*, alone, or whether it must be deemed to constitute a phrase modifying *originally appointed*. Stated another way, the question is whether the section applies to an officer who is *in* any staff corps, or whether it merely applies to an officer who was *originally appointed in* any staff corps?

If *in any staff corps* was intended to refer to the *appointment*, then logically there should be something more in the section to show that individual to whom the computation applies is currently *in* the staff corps involved. For without such, the section applies not only to officers who may currently be in the staff corps but also to all officers who though originally appointed in a staff corps subsequently transfer to the line or another staff corps. In fact, officers transferring to the line would *at the same time* have their service computed *differently* under different sections, namely sections 6387 and 6388. But construed as urged by respondent, there is no requirement

in section 6388 that the officer concerned be *in* the staff corps concerned. On the other hand, if under the proper construction section 6388 is applicable to officers *in* a staff corps, as it would be under petitioners' construction, no further modification is needed to delimit the applicability of section 6388 to staff corps officers.

Moreover, under petitioners' construction, staff corps officers would have retirement and separation dates run substantially the same as their line contemporaries. But with respondent's construction, these dates for staff corps officers will occur entirely haphazardly. For example, John Joseph Cassidy, Jr. of the Naval Academy Class of 1938 is and will continue to be junior in rank to Mark Henry Jordan of the Class of 1937 (CCA Record, Payson 75-76). Yet according to respondent, the *junior* Cassidy will be up for mandatory retirement under 10 USC 6377 one year earlier than the *senior* Jordan.[2] Additionally, both would have their mandatory retirement delayed several years after their line classmates have been retired under 10 USC 6376. Still more ridiculously, under the next section, 10 USC 6389,[3] a *Reserve staff officer* originally appointed lieutenant (junior grade) about the same time that Jordan transferred to the staff corps would have four more years of "total commissioned service" than Jordan. With such remarkable inconsistency in the application of the law, it is little wonder that the Judge Advocate General of the Navy in 1958 attempted to change the 1949 opinions of his predecessor.[4] The subsequent in-

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[2] This assumes that both will retire in the grade of captain.

[3] While this section 6389 was added to the Codification under the Act of September 2, 1958, 72 Stat. 1509, it was originally in Section 411(c) of the Reserve Officer Personnel Act of 1954, 68 Stat. 1170.

[4] Respondent admits that this was the case (R.Br. 12, note 4). It may be of some interest to note that the earlier opinions antedated the Act of May 5, 1950, 64 Stat. 108, Section 13 of which made certain legal qualification and experience mandatory for Judge Advocates General, 50 USC 741.

terpretation proposed by the Judge Advocate General and that contended by petitioners would return the intended order to the existing administrative chaos.

Reviewability

Respondent has argued that on the basis of *Creary* v. *Weeks*, 259 U. S. 336, the action of the Board in this case is not reviewable (R.Br. 13). The non-applicability of this case has been covered in the petition heretofore submitted (Pet. 12) and it goes beyond the purposes of the petition to argue the matter fully here. Suffice it to say that *Creary* v. *Weeks* does not decide against judicial reviewability of an act which is *arbitrary and an abuse of discretion* by a military board.

The respondent thereafter continues to the effect that the Administrative Procedure Act has no application to "military personnel matters". (R.Br.13) It is submitted that this constitutes an admission by respondent of the full scope of judicial nonreviewability which the instant cases stand for, which is not only inconsistent with cases heretofore cited in reference to the question of judicial reviewability but also in conflict with the recent case of *Harmon* v. *Brucker*, (1958), 355 U. S. 579 of this Court involving a discharge, and with the recent Court of Claims decision *Clackum* v. *United States*, C.Cls. 246-56, January 20, 1960, wherein that Court held a discharge issued by the Air Force was illegal and invalid.

An impression may be gained from respondent's brief (R.Br. 14) that petitioners were judged unsatisfactory on a *comparative* basis. This, of course, is not true. What is involved here is not a question of promotion or lack of promotion, but, in effect, a *firing*. For promotion, the board was limited to "three (3) officers" whom it considered "best fitted".[5] Obviously this must be com-

[5] See The Secretary of the Navy's precept convening the Board, paragraph 5 (CCA Record, Payson, 87-88).

parative. But in considering officers for discharge, the criteria was "unsatisfactory performance of duty" with *no* requirement as to numbers or any indication whatsoever that it should be comparative.[6] As previously set forth, the Board's function in this case was not analogous to the thinning out of a herd but rather to the elimination of black sheep. And this latter was on a bureaucratic level where sheeps' records rather than the sheep themselves are looked at. (Pet. 5).[7]

Conclusion

For the reasons previously set forth in the Petition and in view of the arguments set forth in reply to Respondent's Opposition thereto, it is respectfully submitted that this writ of certiorari should be granted.

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[6] Ibid, paragraph 7.

[7] It may be of interest that a total of some 198 officers of the Navy and Naval Reserve were found unsatisfactory in the period of July 1, 1948 to July 1, 1958 (CCA Record, Payson, 104-105). Since there have unquestionably been substantially over 200,000 separate cases of officers being considered for promotion during this period, the rate of finding officers so unsatisfactory is less than .1%. This would make the rate of such findings by the Board in question well more than 2000% of the norm.